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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 SUSAN E. NEWGENT,

13 Plaintiff,

14 vs.

14 WELLS FARGO BANK, N.A., et al.,

15 Defendant.
16

CASE NO. 09cv1525 WQH (WMc)

ORDER

17 HAYES, Judge:

18 The matter before the Court is Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo")
19 Motion to Dismiss Plaintiff's First Amended Complaint (Doc. # 9).
20

21 **BACKGROUND**

22 On March 11, 2009, Plaintiff Susan E. Newgent filed a complaint against Defendants
23 in California Superior Court for the County of Imperial (Doc. # 1 at 2). On July 14, 2009
24 Wells Fargo removed to this Court (Doc. # 1). On July 20, 2009, Wells Fargo filed a Motion
25 to Dismiss (Doc. # 4). On September 4, 2009, Plaintiff filed her First Amended Complaint
26 (Doc. # 6). The Court dismissed Wells Fargo's Motion to Dismiss as moot (Doc. # 13). Wells
27 Fargo filed its Motion to Dismiss Plaintiff's First Amended Complaint on September 14, 2009
28 (Doc. # 9). The Court heard oral argument in the case on October 19, 2009.

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2 **FACTUAL ALLEGATIONS OF THE COMPLAINT**

3 Plaintiff purchased real property in Imperial County, California (Doc. # 6 at 1).
4 Plaintiff and her former husband obtained a mortgage from Wells Fargo (Doc. # 6 at 2).
5 Plaintiff and her former husband divorced on January 1, 2005 and Plaintiff subsequently
6 acquired title to the property through a quit claim deed (Doc. # 6 at 2). Plaintiff's former
7 husband stopped paying child support, leaving Plaintiff unable to pay her mortgage (Doc. #
8 6 at 2). Plaintiff stopped paying her mortgage in March of 2008 (Doc. # 6 at 2). Plaintiff
9 attempted to obtain a loan modification, which Wells Fargo denied because she did not have
10 a job or steady source of income (Doc. # 6 at 2). In October of 2008, after Plaintiff remarried
11 and her financial situation changed, she contacted Wells Fargo again seeking a loan
12 modification (Doc. # 6 at 2). However, Defendant denied her application using her income
13 information from before she had remarried (Doc. # 6 at 3). When Plaintiff informed Wells
14 Fargo that it had used her old income information instead of taking into consideration her new
15 circumstances, Wells Fargo denied ever receiving that information (Doc. # 6 at 3). In late
16 October, Plaintiff received notice that her property would be sold in a Trustee's Sale (Doc. #
17 6 at 3).

18 On October 23, 2008, Plaintiff contacted Wells Fargo and spoke with "Susie" who told
19 Plaintiff that if she submitted a payment of \$2,500.77, the sale of the property would not take
20 place (Doc. # 6 at 3). Plaintiff submitted the payment, but Wells Fargo proceeded with the
21 Trustee's Sale (Doc. # 6 at 3). Wells Fargo then sued Plaintiff for Unlawful Detainer, which
22 resulted in Plaintiff being removed from the property (Doc. # 6 at 3).

23 Plaintiff alleges nine claims for relief: (1) Intentional Misrepresentation; (2)
24 Conversion; (3) Breach of Fiduciary Duty; (4) Breach of the Covenant of Good Faith and Fair
25 Dealing; (5) Declaratory Relief; (6) Quiet Title; (7) Equitable and Promissory Estoppel; (8)
26 Violation of the Equal Credit Opportunity Act; and (9) Violation of the Fair Credit Reporting
27 Act ("FCRA").

28 Wells Fargo moved to dismiss all of Plaintiff's claims (Doc. # 9). Plaintiff conceded

1 in her response that dismissal is appropriate as to her Third Claim for Breach of Fiduciary
 2 Duty, her Fourth Claim for Breach of the Covenant of Good Faith and Fair Dealing, and her
 3 Eight Claim for Violation of the Equal Credit Reporting Act (Doc. # 10 at 2-3).

4 STANDARD OF REVIEW

5 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
 6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure
 7 8(a) provides: “A pleading that states a claim for relief must contain ... a short and plain
 8 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
 9 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal
 10 theory or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*
 11 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

12 To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a complaint
 13 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to
 14 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 15 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
 16 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
 17 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to
 18 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,
 19 --- U.S. ---, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as true
 20 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
 21 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see, e.g.,*
 22 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 683 (9th Cir. 2009) (“Plaintiffs’ general
 23 statement that Wal-Mart exercised control over their day-to-day employment is a conclusion,
 24 not a factual allegation stated with any specificity. We need not accept Plaintiffs’ unwarranted
 25 conclusion in reviewing a motion to dismiss.”). “In sum, for a complaint to survive a motion
 26 to dismiss, the non-conclusory factual content, and reasonable inferences from that content,
 27 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
 28 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).

ANALYSIS

A. Motion to Dismiss

(1) Intentional Misrepresentation

Plaintiff alleges she sent the check to Wells Fargo for \$2,500.77 in reliance on Wells Fargo's agent's representation that it would refinance the property if she made the payment (Doc. # 6 at 4). She claims Wells Fargo had a fiduciary duty to her to "be truthful and look out for her best interests" (Doc. # 6 at 4). She alleges she would not have made the payment if she had known the property would have been sold despite the payment (Doc. # 6 at 4). Plaintiff alleges she suffered "severe emotional distress in an amount in excess of \$500,000" (Doc. # 6 at 5). Plaintiff alleges Wells Fargo's conduct was "carried out in a despicable, deliberate, cold, callus and intentional manner thereby entitling Plaintiff to recover punitive damages from [Wells Fargo] in an amount according to proof" (Doc. # 6 at 5).

Wells Fargo contends Plaintiff's Claim for Intentional Misrepresentation must be dismissed because it is barred by the statute of frauds, fails to allege the necessary elements to state a claim, improperly asserts the existence of a fiduciary duty, and fails to provide the level of specificity required by Federal Rule of Civil Procedure 9(b). Plaintiff responds that the statute of frauds is not a defense because "[t]he underlying basis for this lawsuit is the theory of promissory estoppel contained in the Seventh Claim for relief" (Doc. # 10 at 3).

To state a claim for fraud under California law, the plaintiff must allege "a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance on the misrepresentation, and damage resulting from that justifiable reliance." *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 72-23 (1990). Plaintiff has failed to allege the necessary elements of fraud under California law. Plaintiff alleged that the representation that Wells Fargo would renegotiate her loan if she made a \$2,500.77 payment was false, but does not allege that "Susie" was aware that it was false nor does she allege intent to defraud (*see* Doc. # 6 at 4-5). Plaintiff claims she justifiably relied on Wells Fargo's agent's statement because Wells Fargo had a fiduciary duty to her "to be truthful and look out for her best interests," a position contrary to California law (*see* Doc. # 6 at 4). Under California law,

1 “[i]t has long been regarded as axiomatic that the relationship between . . . a debtor and a
2 creditor” does not create a fiduciary duty. *Price v. Wells Fargo*, 213 Cal. App. 3d 465, 476
3 (1989). Plaintiff also fails to allege facts to support her claim for “damage resulting from” her
4 reliance on the allegedly fraudulent statement. Plaintiff alleged \$500,000 in emotional
5 damages without providing any explanation of how Wells Fargo’s action caused her emotional
6 distress (*see* Doc. # 6 at 4-5). The Court concludes that the Complaint fails to state a claim for
7 Intentional Misrepresentation against Wells Fargo.

8 (2) Conversion

9 Plaintiff alleges she demanded that Wells Fargo return her payment for \$2,500.77 when
10 she learned that the payment would not allow her to negotiate refinancing her mortgage (Doc.
11 # 6 at 5). Plaintiff alleges she had “a right to the possession” of the payment and that Wells
12 Fargo wrongfully converted those funds when it cashed the check (Doc. # 6 at 5). Plaintiff
13 alleges she suffered “economic damages in excess of \$500,000” and “severe emotional distress
14 in an amount in excess of \$500,000” (Doc. # 6 at 5). Plaintiff alleges Wells Fargo’s conduct
15 was “carried out in a despicable, deliberate, cold, callus and intentional manner thereby
16 entitling Plaintiff to recover punitive damages from [Wells Fargo] in an amount according to
17 proof” (Doc. # 6 at 6).

18 Wells Fargo contends Plaintiff’s Claim for Conversion should be dismissed because
19 Plaintiff concedes that she owed Wells Fargo money (Doc. # 9 at 14). Plaintiff asserts in her
20 response that the payment was not a mortgage payment, but rather a payment based on a
21 “separate agreement” with Wells Fargo to pay \$2,500.77 in exchange for the opportunity to
22 stop the Trustee’s Sale and renegotiate the loan (Doc. # 10 at 5). Plaintiff did not allege a
23 separate agreement in her complaint (*see* Doc. # 6 at 5-6).

24 “To establish a conversion, plaintiff must establish an actual interference with his
25 ownership or right of possession. . . .” *Moore v. Regents of University of California*, 51 Cal.
26 3d 120, 136 (Cal. 1990) (citation omitted). Plaintiff alleges she wrote a check to Wells Fargo
27 (Doc. # 6 at 1-2). Plaintiff concedes that Wells Fargo was her mortgage lender and that she
28 owed Wells Fargo additional money to repay her loan (Doc. # 6 at 2). Alleging Wells Fargo

1 accepted a payment yet conceding that Plaintiff owed the payment cannot be the basis of a
2 conversion claim against Wells Fargo. The Court concludes that the Complaint fails to state
3 a claim for Conversion against Wells Fargo.

4 (3) Breach of Fiduciary Duty

5 Plaintiff has conceded this claim was not properly plead (Doc. # 10 at 1). Therefore,
6 the Court will not address it.

7 (4) Breach of the Covenant of Good Faith and Fair Dealing

8 Plaintiff has conceded this claim was not properly plead (Doc. # 10 at 1-2). Therefore,
9 the Court will not address it.

10 (5) Declaratory Relief

11 Plaintiff alleges that she is entitled to “retain possessory rights¹ to the property based
12 on [Wells Fargo’s] promise to cease the sale of the property” and seeks a “judicial
13 determination and declaration of the rights of the parties” (Doc. # 6 at 8). Wells Fargo
14 contends Plaintiff’s claim for Declaratory Relief fails to state a claim because she has not
15 alleged that she offered tender (Doc. # 9 at 16-17). Plaintiff “contends she is able to retain
16 possessory rights to the property based on Defendant’s promise to cease the sale of the
17 property” and seeks a judicial determination that she retains such rights. In her response,
18 Plaintiff concedes that “recision requires tender” but states she is not seeking recision of the
19 mortgage, only that the sale be set aside (Doc. # 9 at 6).

20 Plaintiff’s complaint makes clear that what she seeks is a judicial determination that she
21 may regain possession of her house, a remedy that would require recision not of her original
22 mortgage but of the subsequent Trustee’s Sale. Plaintiff is seeking recision and correctly
23 concedes that she cannot do so without tender. *See Arnolds Management Corp. v. Eischen*,
24 158 Cal. App. 3d 575, 578 (Cal. App. 2d Dist. 1984) (“It is settled that an action to set aside
25 a trustee’s sale for irregularities in sale notice or procedure should be accompanied by an offer
26 to pay the full amount of the debt . . .”). Because Plaintiff has not alleged that she offered

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28 ¹ This claim is plead as if the Trustee’s Sale had not yet taken place, but in fact, it is clear from
other parts of the complaint Plaintiff’s home was sold in a Trustee Sale in late October of 2008 (*see*
Doc. # 6 at 3).

1 tender, the Court concludes that the Complaint fails to state a claim for declaratory relief
2 against Wells Fargo.

3 (6) Quiet Title

4 Plaintiff alleges Wells Fargo's claim to the property "is void based on [Wells Fargo's]
5 purposeful misrepresentation to Plaintiff that by paying \$2,500.77 to [Wells Fargo], the
6 Trustee's Sale would cease and a loan modification be created" (Doc. # 6 at 9). Plaintiff seeks
7 to quiet title (Doc. # 6 at 9).

8 Wells Fargo contends Plaintiff's claim for Quiet Title suffers from the same deficiency
9 as her claim for Declaratory Relief—she failed to allege an offer of tender in a claim which
10 seeks to set aside the trustee sale. Because Plaintiff has not alleged that she offered tender, the
11 Court concludes that the Complaint fails to state a claim for quiet title against Wells Fargo.
12 *See Arnolds Management Corp.*, 158 Cal. App. 3d at 578 ("It is settled that an action to set
13 aside a trustee's sale for irregularities in sale notice or procedure should be accompanied by an
14 offer to pay the full amount of the debt . . .").

15 (7) Equitable and Promissory Estoppel

16 Plaintiff alleges she reasonably relied on Wells Fargo's agent's statement that her
17 payment would stop the Trustee's Sale, resulting in her being deprived of the \$2,500.77 and
18 of the property (Doc. # 6 at 9). Plaintiff alleges that she is therefore "entitled to special
19 damages and general damages" as well as attorney's fees (Doc. # 6 at 9).

20 Wells Fargo contends Plaintiff's Estoppel claims are deficient because Plaintiff fails to
21 show detrimental reliance, the statute of frauds bars her claim, and her reliance was not
22 reasonable (Doc. # 9 at 9-11). Plaintiff contends in her response that she "would not have sent
23 the check" and "did not take any legal action to stop the sale," which shows detrimental
24 reliance, that estoppel defeats the statute of frauds, and that reliance was reasonable because
25 "Susie" is an agent of Wells Fargo (Doc. # 10 at 4-6)

26 "[D]etrimental reliance is an essential feature of promissory estoppel." *Healy v.*
27 *Brewster*, 59 Cal. 2d 455, 463 (Cal. 1963). Plaintiff's only allegation of detrimental reliance
28 in her complaint is that she sent in a payment for \$2,500.77 in reliance on the promise to

1 renegotiate her loan (Doc. # 6 at 9). As Wells Fargo points out, Plaintiff was already obligated
2 to make payments on her mortgage. The reliance was therefore not detrimental. Plaintiff also
3 fails to properly plead reasonable reliance, another required element of estoppel. *See Thomson*
4 *v. International Alliance of Theatrical Stage Employees*, 232 Cal.2d 446, 454 (1965).
5 Plaintiff's only assertion that her reliance was reasonable is that "Plaintiff was justified in her
6 reliance upon the representation, as WELLS FARGO had a fiduciary duty to her to be truthful
7 and to look out for her best interests" (Doc. # 6 at 4). However, Wells Fargo does not have a
8 fiduciary duty to Plaintiff. *See Price v. Wells Fargo*, 213 Cal. App. 3d 465, 476 (1989).
9 Because Plaintiff has not alleged detrimental reliance and reasonable reliance, the Court
10 concludes that the Complaint fails to state a claim for equitable or promissory estoppel against
11 Wells Fargo.

12 (8) Violation of the Equal Credit Opportunity Act

13 Plaintiff has conceded this claim was not properly plead (Doc. # 10 at 1-2). Therefore,
14 the Court will not address it.

15 (9) Violation of the Fair Credit Reporting Act

16 Plaintiff alleges Wells Fargo violated the Fair Credit Reporting Act ("FCRA"), 15
17 U.S.C. §§ 1681 et seq. (Doc. # 6 at 10). The alleged violations are failure to provide credit
18 scores, failure to provide Notice to Home Loan Application, failure to provide Notices of
19 Adverse Action, failure to provide Risk-Based Pricing Notice, and failure to make
20 Investigative Consumer Report Disclosure (Doc. # 6 at 11). Plaintiff alleges she is entitled to
21 "rescind the loan transaction" and recover the money previously paid to Wells Fargo (Doc. 6
22 at 11).

23 Wells Fargo contends Plaintiff's claim for violation of the FCRA fails to state a claim
24 because it fails to offer tender of the money Plaintiff received from Wells Fargo and fails to
25 allege that Plaintiff notified the credit reporting agencies (Doc. # 9 at 18-20). Plaintiff
26 concedes that tender would be required in order to get rescission, but states that her FCRA claim
27 does not in fact seek rescission (Doc. # 10 at 11). However, this is in fact what Plaintiff
28 explicitly requests in her FCRA claim: "Plaintiff are informed and believe, and thereon allege,

1 that as a result of the conduct of defendants, Plaintiff are entitled to rescind the loan
2 transaction” (Doc. # 6 at 11). Plaintiff has conceded that her FCRA claim is defective
3 because it seeks rescision of the loan and “[j]udgment that Plaintiff is the owner in fee simple
4 of the property and defendants have no interest in the property” without offering tender (*see*
5 Docs. # 6 at 12, # 10 at 6). The Court therefore concludes Plaintiff has failed to state a claim
6 for a violation of the FCRA.


7 **B. Leave to Amend**

8 Plaintiff requests leave to amend to Complaint, “in the event the Motion to Dismiss is
9 granted” as to all but the Eighth Claim (Doc. # 9 at 1-2). The request for leave to amend is
10 granted. Plaintiff may file an amended complaint within 14 days.

11 **CONCLUSION**

12 The Motion to Dismiss First Amended Complaint (Doc. # 9) is **GRANTED**. Plaintiff’s
13 request for leave to amend is **GRANTED**. Plaintiff may file an amended complaint with in
14 14 days of the date of this order.

15 DATED: October 20, 2009

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17 **WILLIAM Q. HAYES**
18 United States District Judge
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